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COUNTERSTATEMENT OF QUESTIONS INVOLVED.

1. Did not the courts below correctly hold that there was insufficient evidence to support a finding that service of process was validly made on an officer of M. V. Shuttler, Inc. and Lea River Lines, Inc., in accordance with the provisions of Rule 4(d)(3) of the Federal Rules of Civil Procedure.

2. Where one of the Respondents, a management services company, exercised no dominion or control over the remaining Respondents, and where no evidence was presented to support a finding that the remaining Respondents effectively conducted business in the jurisdiction through the medium of the management services company, did not the courts below correctly hold that service of process made on the management services company was insufficient of itself for the court to acquire jurisdiction over the remaining Respondents.

COUNTERSTATEMENT OF THE CASE.

The within actions were commenced by Petitioner on January 30, 1959, in the United States District Court for the Eastern District of Pennsylvania. They were founded on alleged injuries suffered by Petitioner on April 19, 1957, while serving as cook on board the vessel "Shuttler", which, at the time, was wholly owned by M. V. Shuttler, Inc., one of the Respondents (50a). The Marshal attempted to serve the suit papers by leaving copies thereof at the office of Transportation Management Service, Inc., another of the Respondents, located at 1813 Ranstead Street in Philadelphia. Specifically, the suit papers were left with "a woman in charge of the office of Transportation Management Service, Inc." The Marshal's Return of Service further states that this woman refused to give her name or title at Transportation (10a).

Motions to vacate service of process were then filed on behalf of the Respondents, M. V. Shuttler, Inc. and Lea River Lines, Inc. Petitioner then obtained the depositions of various officers of Transportation, including Felicia L. Bandos, who was also an officer of Shuttler and Lea, an arrangement which was part of the overall management services which Transportation rendered to the other Respondents. It is noteworthy that, during the course of these exhaustive depositions, the Petitioner failed to ask Miss Bandos whether she was the unidentified woman who received the suit papers at Transportation's office, nor was any real effort made by Petitioner to clear up this question of identity. Subsequently, Circuit Judge Hastie, on the basis of an extensive record, granted Respondents' motions to vacate service (115a). In his Memorandum, Judge Hastie found that neither Shutler nor Lea had designated

Transportation as agent for the purpose of receiving service of process. Furthermore, Judge Hastie found that the record could not support the contention that Transportation was an agent, in fact or in law, of the other two Respondents. The record merely revealed that Transportation, as a management company, performed certain routine services for the other Respondents such as accounting, bookkeeping and the preparation of tax returns. Judge Hastie held that the essential element of "control" by Shuttler and/or Lea over Transportation was missing, so as to preclude the finding of any agency relationship (113a).

Judge Hastie also rejected the fictitious assertion which Petitioner has made throughout this litigation that Miss Bandos was actually the unidentified woman who received the suit papers at the office of Transportation. Judge Hastie also commented upon the failure of Petitioner to clarify this question during the depositions held before Hearing (114a).

The Petitioner's case against Transportation proceeded to trial before District [now Circuit] Judge Van Dusen on December 6, 1965. For purposes of the trial, Petitioner completely reversed her strategy and attempted to argue that Transportation exercised such a degree of control over Shuttler so as to reduce it to a mere instrumentality and invest Transportation with tort liability for accidents occurring aboard Shuttler's vessel. At the close of Petitioner's case, Judge Van Dusen granted Transportation's motion to dismiss.

The court found from the evidence that there was no identity of stock ownership between Transportation and Shuttler (155a, 202a). Furthermore, the officers and directorate of the two companies were different, except for Miss Bandos who was a Secretary and Director of each (43a, 44a, 90a, 91a). However, the "arrangement" involv-

ing Miss Bandos was solely for the convenience of Transportation's customer, Shuttler, and completely justified, without giving rise to any "sinister" inferences, in light of the type of services which Transportation performed. There was ample evidence in the record that Miss Bandos was an officer of other companies for whom her firm performed services, and which, by no stretch of the imagination, could be considered as having a relationship to the present lawsuit or being a part of the vague "Leaman complex" of companies which Petitioner attempted to conjure up (94a, 202a, 210a). The court also found that Transportation was simply a management services company which performed certain clerical and other routine services for Shuttler. These services included the preparation of tax returns and other governmental forms, keeping the corporate minute book, paying bills and general bookkeeping (48a, 98a, 99a, 104a, 106a). For these services, Transportation was periodically paid by Shuttler a fee which was computed on the basis of the amount of work performed (49a, 50a). As previously noted, Transportation performed similar services for other customers with no conceivable relationship to the present litigation, such as a candy manufacturer in Altoona, a cannery in Frankford, and a machine shop (71a, 214a, 215a, 216a).

The record clearly showed that decisions and functions which were more than just routine or ministerial were not delegated by Shuttler to Transportation. Transportation did no purchasing for Shuttler, and all bills, before being paid, had to be approved by Shuttler's president, John Fetsko, or otherwise processed in accordance with his instructions (100a, 212a). All information necessary to make up payrolls was assembled and forwarded to Transportation by Shuttler (106a, 107a). Transportation did no advertising and solicited no business on Shuttler's behalf (52a,

53a). The hiring and firing of Shuttler'e personnel was done by Shuttler's president, or by vessel captains with the president's approval (211a, 212a). The cost of Shuttler's vessel was not underwritten or financed by Transportation.

Finally, Transportation exercised no control or direction over the movement and activities of Shuttler's vessel, but, occasionally, was merely the conduit through which such directions came which had been initiated by others (171a, 211a). In addition, each of the Respondents maintained a corporate identity separate and distinct from that of the others.

On the basis of the above facts, which were absolutely uncontroverted, the court rejected Petitioner's contentions that Transportation exercised such a degree of control over the other Respondent companies so as to, in effect, "merge" these companies for the purpose of imposing legal liability, or that Transportation was the nerve center of a vast complex of captive "paper" companies (410a). The persistent references to the "Leaman complex" are merely the result of advocacy and cannot be supported by any sound analysis of the record.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

I. Petitioner Failed to Serve an Officer or Agent of Shuttler and Lea.

The Petitioner persists to argue that the unidentified woman who received suit papers from the Marshal at Transportation's office was actually Felicia L. Bandos, an officer of each of the Respondents. It suffices to say that there is not one scrap of evidence in the record to support this inference. Accordingly, this baseless contention should be rejected out of hand as did the District Court and the Court of Appeals below. The strength of Petitioner's own conviction on this point is clearly borne out by her counsel's failure to put the necessary question directly to Miss Bandos during depositions prior to the Hearing on Respondent's motion to vacate service.

In the course of desperate advocacy, Petitioner points out that the Marshal characterized the woman to whom he delivered the suit papers as being "in charge" of Transportation's office. Petitioner then points out that, during the course of depositions, Miss Bandos stated that, generally speaking, she would probably fall into the category of Transportation's office manager. From these two unrelated points, Petitioner argues that Miss Bandos *must* have been the woman who received the suit papers. Quite obviously, these two points do not represent a logical progression, and it cannot be inferred that since Miss Bandos was office manager, she was, therefore, the woman who the Marshal concluded to be physically in charge of the office on any given day.

At the next level, Petitioner argues that if the suit papers were not delivered personally to Miss Bandos, then,

surely, they were delivered to someone working for Miss Bandos. There is no evidence in the record to support this conclusion. However, even if it were true, it would still not make for effective service on Shuttler and Lea since the Rules require that an officer be personally served and not a subordinate or other individual vaguely responsible to that officer.

Finally, Petitioner points out that, eventually counsel did specially appear on behalf of Shuttler and Lea for the purpose of contesting service of process. From that fact, Petitioner argues that these Respondents obviously received notice of the suits in some manner and, therefore, the fundamental defects in attempting to make service of process should be overlooked. By making this argument, Petitioner is obviously asking this Court to sweep away its own specific Rules which govern the mechanics of effecting service.

Throughout the litigation, Petitioner has falsely accused the Respondents of deliberately attempting to evade service and actively creating an ambiguity as to the identity of the woman who actually received the suit papers. These accusations are totally unsupported by any evidence in the record and have been pressed with such vehemence as to exceed the bounds of legitimate advocacy. The case of *Roth v. W. T. Cowan, Inc.*, 97 F. Supp. 675 [D. C. E. D. N. Y.] is without any application to this case since, there, the court had positive evidence upon which to base its finding that, when confronted by the Marshal in person, the third party defendant deliberately denied his identity. This point, obviously, was the foundation upon which the entire decision of the court was based.

II. Serving Process on Transportation Was Not Legally Equivalent to Serving Shuttler and Lea.

The Petitioner has been unable to deny that neither Shuttler nor Lea appointed Transportation as its agent in Pennsylvania for the purpose of receiving service of process. Therefore, in order to prevail, the Petitioner must prove that the separate legal identities of the Respondents should be disregarded, and that the three Respondents should be considered as one for purposes of service of process. See *Fitzgerald v. Hilton Hotels Corporation,* 183 F. Supp. 342 [D. C. E. D. Pa. 1960]. After reviewing the statement of facts in this case, this contention vanishes into thin air. Petitioner cannot even go so far as to show a parent-subsidiary relationship between the Respondents —although, even such a relationship will not permit a plaintiff to submit the subsidiary company to the jurisdiction of the court by making service on the parent. See *Fitzgerald v. Hilton Hotels Corporation* [*supra*]. The record clearly indicates that Transportation simply performed a variety of management services for Shuttler, but in no way assumed any of the business prerogatives or exercised any "control" over the activities and operations of Shuttler or its property. Furthermore, the record indicates that a strict "customer relationship" existed between Transportation and Shuttler at all times.

In her brief, petitioner has inaccurately asserted that the case at bar bears similarity to the case of *Remington-Rand, Inc. v. Knapp Monarch Co.,* 139 F. Supp. 613 [D. C. E. D. Pa. 1956]. In that case, involving patent infringement, service of process on one Arnold Co., Inc. was held to be sufficient so as to effect proper service on the defendant *Knapp-Monarch.* In that case, however, *Arnold* solicited business on the defendant's behalf and undertook to fulfill various warranty obligations owed by the defendant

to consumers within the jurisdiction. In the case at bar, Transportation did not solicit or in any way perform the business of Shuttler. If Transportation at all became involved with Shuttler's customers, it was merely as a bill-payer, or conduit of messages. Clearly, these activities do not constitute the necessary element of "control" or identity of interest sufficient to make service of process on Transportation effective service on the other Respondents.

The facts on the record undeniably show that there was no identity of interest between the three Respondents so as to do away with the requirements of the Federal Rules concerning service of process. To have allowed the Petitioner to pry, by means of discovery, into the activities of other companies alleged to be part of a single "corporate octopus", would not only have been unwarranted but highly offensive in light of the uncontroverted evidence which was more than adequate to dispose of the issues. Having failed to reach the other Respondents through an attack on Transportation, the Petitioner should not be allowed to subvert the court's discovery procedures in a "scatter-shot" effort to find other companies or persons against whom to assert some tortured theory of liability. Petitioner's attempts to conjure up the specter of the "Leaman complex" are designed solely to cloud the issues in this case. The Petitioner obviously could have brought suit against Shuttler in Delaware, the state of incorporation, or in any of several states where Shuttler was legitimately carrying on its towing business and, therefore, was amenable to suit. Petitioner's failure to commence her actions against Shuttler in the proper forum clearly explains the present attempt to distort the Respondents' true relationships to each other.

CONCLUSION.

There is nothing about the decisions below which merits hearing and decision by this Court. The District Court below clearly and correctly carried out its function as fact finder, and arrived at the only holdings consistent with the uncontroverted evidence concerning Transportation's relationship with Shuttler. The Circuit Court summarily affirmed the verdicts of the District Court. The case poses no conflict to be resolved by this Court, and, accordingly, the Petition should be denied.

Respectfully submitted,

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